MOTION FILED
AUG 4 1998

(2)

No. 97-1507

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

KARRY TEEL, CARL HOLDEN,
AND WILLIAM MALONE,

Petitioners,

v.

RAJIV KHURANA,

Respondent.

PETITIONERS' MOTION TO VACATE AND FOR DOUBLE COSTS UNDER RULE 44.7

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August 4, 1998

8 pp

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1. Petitioners respectfully move this Court for an Order vacating the judgment of the United States Court of Appeals for the Fifth Circuit and remanding with instructions to dismiss the case as moot. See United States v. Munsingwear Corp., 340 U.S. 36 (1950). See generally STERN & GRESSMAN, SUPREME COURT PRACTICE § 18.5 (7th ed. 1993). Respondent initially waived his right to respond to the Petition for a Writ of Certiorari. When the Court called for a response (see App. 1), Respondent failed to comply. Instead, Respondent requested that Claimants agree voluntarily to arbitrate their dispute. Only when Claimants declined did Respondent decide to withdraw the federal claims from his Complaint and remand his state law claims to state court rather than defend the decision of the court of appeals. Respondent's initial motion to dismiss without prejudice was

denied. Respondent then moved to dismiss with prejudice, and the District Court granted the motion on July 16, 1998. (App. 2.) As such, the issues raised by the Petition are entirely moot.

2. This case satisfies the criteria for vacatur. The judgment below, if left in place, would expose Petitioners to assertions of collateral estoppel and res judicata in the imminent state court proceedings or any subsequent federal court proceedings brought by other parties. Moreover, Respondent's decision to abandon his federal claims was made unilaterally and was not conditioned in any way upon the disposition of the Petition in this Court or the disposition of the judgment of the court of appeals. Finally, the Petition presents substantial questions that have divided the courts of appeals.

Under this Court's precedents:

> When a civil case becomes moot pending appellate adjudication, "[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950). Vacatur "clears the path for future relitigation" by eliminating a judgment the loser was stopped from opposing on direct review. Id. at 40. Vacatur is in order when mootness occurs through happenstance–circumstances not attributable to the parties–or, relevant here, the "unilateral action of the party who prevailed in the lower court." U.S. Bancorp Mortgage Co. [v. Bonner Mall Partnership, 513 U.S. 18,] 23 [(1994)]; cf. id., at 29 ("motness by reason of

> settlement [ordinarily] does not justify vacatur of a judgment under review").

Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1071 (1997) (alterations in Arizonans for Official English).

3. This case also presents "extraordinary circumstances" entitling Petitioners to an award of double costs under Rule 44.7. In point of fact, only $300 is at stake – i.e., under Rule 44.3, Petitioners would receive double the fee they paid to file the Petition for Certiorari – and that amount would cover only a small portion of the approximately $1000 cost of printing the Petition. But the principle involved is important. Respondent put Petitioners to the cost of litigating this issue not only in the district court, but also in the Fifth Circuit, and then before this Court through the filing of a Petition for a Writ of Certiorari. Even then, Respondent did not withdraw his claims but instead sought refuge in the possibility that the Court would not call for a response and would deny certiorari. When the Court did call for a response – expressly directing Respondent that "[f]orty printed copies of your response, together with proof of service thereof, should be filed on or before May 11, 1998" (App. 1) – Respondent simply decided not to comply.

Respondent's counsel subsequently informed Petitioners that Respondent intended to withdraw his federal claims. After consulting with the Clerk's office, counsel for Petitioners requested that Respondent's counsel do so before the Court's final Conference so that the matter would be resolved before the summer recess. But Respondent proceeded to move to withdraw his federal claims without prejudice, a maneuver that would have permitted Respondent to refile the same claims one day after this Court removed the Petition from its docket. The district court

understandably denied that motion. Respondent subsequently moved to dismiss with prejudice and that motion was granted. But as a result, this Court has been inconvenienced by the fact that the case remains on its docket and Petitioners have suffered the uncertainty of not knowing whether they remain bound by the adverse judgment of the Fifth Circuit.

4. Petitioners therefore respectfully move the Court for an Order vacating the judgment below and awarding double costs.

Respectfully submitted,

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August 4, 1998

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

April 9, 1998

AREA CODE 202
479-3011

Jack E. Truitt, Esquire
3027 Ridgelake Drive
Metairie, LA 70002-4924

Re: 97-1507 - Teel, Karry, et al.
v. Khurana, Rajiv

Dear Mr. Truitt:

Although your office has waived the right to file a response to the petition for a writ of certiorari in the above case, the Court nevertheless has directed this office to request that a response be filed.

Forty printed copies of your response, together with proof of service thereof, should be filed on or before May 11, 1998.

Your attention is directed to the provisions of Rule 33 of the rules of this Court. Please note that the color of the cover of your brief should be orange.

Sincerely,

William K. Suter
Clerk

cc: James A. Williams, Esquire
Jonathan David Schiller, Esquire

MINUTE ENTRY
McNAMARA, J.
JULY 15, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RAJIV KHURANA	*	CIVIL ACTION
VERSUS	*	NO: 95-1217 C/W 98-0286
INNOVATIVE HEALTH CARE SYSTEMS, INC., ET AL	*	SECTION: "D"(2)

Before the court is the **"Motion to Dismiss with Prejudice and to Remand"** filed by Plaintiff, Rajiv Khurana. Defendants, Innovative Heath Care Systems, Inc., Kerry Teel, Carl Holden, William Malone, and IHS River Region Hospital of Vacherie, La., Inc., filed a memorandum in response. The motion was set for hearing on Wednesday, July 15, 1998.

Having considered the memoranda of counsel and the applicable law, and having heard oral argument from counsel, the court **GRANTS** the motion thereby dismissing Plaintiff's federal law claims asserted in this action, including Plaintiff's RICO claims, ***with prejudice***, and remanding to state court Plaintiff's state law claims asserted in this action.

However, the court **REFUSES** to include int his order (or any other order) the language propsoed by Plaintiff's counsel regarding the "[reservation of] . . . plaintiff's direct or derivative claims made in the sealed litigation bearing docket number 95-1088 "C" of this Honorable Court." Rather, the court makes **no** determination of how the court's dismissal of Plaintiff's federal law claims, including Plaintiff's RICO claims, asserted in this action **will or will not** affect claims asserted by Plaintiff in any other litigation.

* * * * * *

/signature/

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RAJIV KHURANA	*	CIVIL ACTION
VERSUS	*	NO: 95-1217 C/W 98-0286
INNOVATIVE HEALTH CARE SYSTEMS, INC., ET AL	*	SECTION: "D"(2)

JUDGMENT

For the reasons set forth in this court's Minute Entry of July 15, 1998,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's federal law claims, including Plaintiff's RICO claims, be and are hereby dismissed ***with prejudice***;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's remaining state law claims be and are hereby **REMANDED** to the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana,

New Orleans, Louisiana, this 15 day of July, 1998

/signature/
UNITED STATES DISTRICT JUDGE